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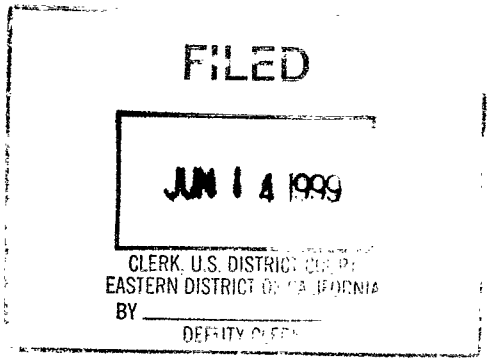

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

MARCO A. PONCE-BRAN,

Plaintiff,

v.

SACRAMENTO NATURAL FOODS COOPERATIVE, INC., KARMYN KLEINSCHMIDT, STEPHANIE MERRIMAN, PAM MUSANTE, JANET WHALEN-ZELLER, JEROLD LIGONS, REBECCA MILLER, YANTRA BERTELLI, CYNTHIA JOHNSON and DONNA PITTS,

Defendants.

_____/

NO. CIV. S-96-1749 LKK/JFM

O R D E R

Before the court are the parties' cross-motions for summary judgment. The court decides the motions on the pleadings and papers filed herein. See Local Rule 78-230(h).

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I.

THE FACTS[1]

Plaintiff is a former employee of defendant, the Sacramento Natural Foods Cooperative ("SNFC"). In April of 1995, plaintiff interviewed for a transfer from his position as a cash register clerk to SNFC's Health and Beauty Aids Department ("HABA"). During the interview, plaintiff informed the interviewer, Cynthia Johnson, that he would not be able to work on Saturdays for religious reasons.

SNFC hired another applicant, Andy Keogh, for the position. Keogh held different religious beliefs from plaintiff but, like plaintiff, informed SNFC that he could not work on Saturdays. On July 6, 1995, plaintiff resigned from his employment at SNFC. Thereafter, plaintiff filed this suit in propria persona against SNFC and a number of its employees.

II.

PROCEDURAL HISTORY

The court granted defendant's motions to dismiss plaintiff's original and first amended complaints as to some claims and denied them as to others. See Orders dated January 21, 1998 and July 20, 1998. On August 20, 1998, the court ordered plaintiff's second amended complaint stricken for failure to comply with the court's July 20, 1998 order granting leave to amend. Then, on August 27, 1998, plaintiff filed a

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[1] The facts as stated herein are undisputed unless otherwise noted.

third amended complaint.

In his third amended complaint, plaintiff alleges three Title VII violations against SNFC based on its failure to accommodate plaintiff's religious beliefs, disparate treatment of plaintiff due to his race, color or national origin and retaliation against plaintiff for filing a complaint with the Department of Fair Employment and Housing. As to all defendants (SNFC and the individual defendants), plaintiff alleges violations of the Fair Employment and Housing Act (which parallel his allegations under Title VII) as well as termination in violation of public policy, defamation, interference with prospective economic advantage and intentional infliction of emotional distress. Defendants move for summary judgment on all of plaintiff's claims, and plaintiff cross-moves for summary judgment.

III.

STANDARDS

Summary judgment is appropriate when it is demonstrated that there exists no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); See also Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970); Owen v. Local No. 169, 971 F.2d 347,355(9th Cir. 1992).

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Under summary judgment practice, the moving party

> [A]lways bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.

Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). "[W]here the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the 'pleadings, depositions, answers to interrogatories, and admissions on file.'" Id. Indeed, summary judgment should be entered, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. Id. at 322. "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Id. In such a circumstance, summary judgment should be granted, "so long as whatever is before the district court demonstrates that the standard for entry of summary judgment, as set forth in Rule 56(c), is satisfied." Id. at 323.

If the moving party meets its initial responsibility, the burden then shifts to the opposing party to establish that a genuine issue as to any material fact actually does exist.

Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986); See also First Nat'l Bank of Ariz. v. Cities Serv. Co., 391 U.S. 253, 288-89 (1968); Ruffin v. County of Los Angeles, 607 F.2d 1276, 1280 (9th Cir. 1979), cert. denied, 455 U.S. 951 (1980).

In attempting to establish the existence of this factual dispute, the opposing party may not rely upon the denials of its pleadings, but is required to tender evidence of specific facts in the form of affidavits, and/or admissible discovery material, in support of its contention that the dispute exists. Rule 56(e); Matsushita, 475 U.S. at 586 n.11; See also First Nat'l Bank, 391 U.S. at 289; Strong v. France, 474 F.2d 747, 749 (9th Cir. 1973). The opposing party must demonstrate that the fact in contention is material, i.e., a fact that might affect the outcome of the suit under the governing law, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987), and that the dispute is genuine, i.e., the evidence is such that a reasonable jury could return a verdict for the nonmoving party, Anderson, 477 U.S. 248-49; See also Wool v. Tandem Computers, Inc., 818 F.2d 1433, 1436 (9th Cir. 1987).

In the endeavor to establish the existence of a factual dispute, the opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient that "the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial."

First Nat'l Bank, 391 U.S. at 290; See also T.W. Elec. Serv., 809 F.2d at 631. Thus, the "purpose of summary judgment is to 'pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.'" Matsushita, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e) advisory committee's note on 1963 amendments); See also International Union of Bricklayers & Allied Craftsman Local Union No. 20 v. Martin Jaska, Inc., 752 F.2d 1401, 1405 (9th Cir. 1985).

In resolving the summary judgment motion, the court examines the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any. Rule 56(c); See also SEC v. Seaboard Corp., 677 F.2d 1301, 1305-06 (9th Cir. 1982). The evidence of the opposing party is to be believed, Anderson, 477 U.S. at 255, and all reasonable inferences that may be drawn from the facts placed before the court must be drawn in favor of the opposing party, Matsushita, 475 U.S. at 587 (citing United States v. Diebold, Inc., 369 U.S. 654, 655 (1962) (per curiam)); See also Abramson v. University of Hawaii, 594 F.2d 202, 208 (9th Cir. 1979). Nevertheless, inferences are not drawn out of the air, and it is the opposing party's obligation to produce a factual predicate from which the inference may be drawn. See Richards v. Nielsen Freight Lines, 602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985), aff'd, 810 F.2d 898, 902 (9th Cir. 1987).

Finally, to demonstrate a genuine issue, the opposing party "must do more than simply show that there is some metaphysical

doubt as to the material facts. . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" Matsushita, 475 U.S. at 587 (citation omitted).

IV.

ANALYSIS

Plaintiff alleges both federal and state claims. Should plaintiff fail to survive summary judgment on his Title VII claims, the court will have the option of dismissing the remainder of his claims since they arise under state law and there is no diversity of citizenship between the parties. Accordingly, I turn first to plaintiff's Title VII claims.

A. FAILURE TO ACCOMMODATE RELIGIOUS BELIEFS

Plaintiff alleges that SNFC chose Keogh for the HABA clerk position because plaintiff requested Saturdays off to observe his Sabbath. Title VII provides that "[i]t shall be an unlawful employment practice for an employer . . . to refuse to hire . . . or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's . . . religion . . . ." 42 U.S.C. § 2000e-2(a). Under Title VII an employer must make "reasonable accommodations, short of undue hardship, for the religious practices of his employees and prospective employees." Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 74 (1977).

Title VII religious accommodation claims are assessed under a two-part analysis. Heller v. EBB Auto Co., 8 F.3d 1433, 1438

(9th Cir. 1993). First, the court must determine whether the plaintiff can establish a prima facie case of religious discrimination. Id. Second, if the employee does so, the burden shifts to the employer to show that it "negotiate[d] with the employee in an effort reasonably to accommodate the employee's religious beliefs." EEOC v. Hacienda Hotel, 881 F.2d 1504, 1513 (9th Cir. 1989). In this case, the court need not reach the second step, for plaintiff has failed to establish a prima facie case of religious discrimination, i.e., that (1) he had a bona fide religious belief, the practice of which conflicted with a duty of his employment, (2) he informed SNFC of the belief and the conflict, and (3) he was threatened with or subjected to discriminatory treatment because of his inability to fulfill his job responsibilities. Heller, 8 F.3d at 1438.

As to the first element of plaintiff's prima facie case, SNFC does not dispute that plaintiff had a bona fide religious belief but does contest that practice of his beliefs conflicted with the duties of a HABA clerk. Like plaintiff, Keogh also informed SNFC that he could not work Saturdays if selected for the HABA position. See Defs' Exh. D (Keogh's application stating that he needed Saturdays off to visit with his son); Decl. of Cynthia Johnson at ¶ 7 (averring that Keogh informed her during the interview that he could not work Saturdays). SNFC hired Keogh -- evidence that working on Saturdays was not a duty of employment in the HABA Department. Plaintiff thus cannot meet the first element of his prima facie case.

Plaintiff cannot prove that SNFC subjected him to any discriminatory treatment because of his inability to fulfill a responsibility expected of HABA clerks. Therefore, plaintiff cannot prevail on the third element of his prima facie case. Accordingly, defendants are entitled to summary judgment on plaintiff's religious accommodation claim.

B. RETALIATION

Plaintiff also alleges that SNFC denied him the HABA position because (1) he protested against the use of evaluation forms that had not been validated pursuant to the Uniform Guidelines on Employee Selection Procedures and (2) he filed a complaint with the DFEH on May 10, 1995.[2] Title VII provides that "[i]t shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter . . ." 42 U.S.C. § 2000e-3(a).

The elements of a prima facie case for retaliation in violation of Title VII are that the plaintiff engaged in a protected activity and suffered an adverse employment decision and that there was a causal link between the two. Wrighten v. Metropolitan Hospitals, Inc., 726 F.2d 1346, 1354 (9th Cir. 1984). By establishing a prima facie case of retaliation, a plaintiff effectively creates a presumption that his employer

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[2] Since plaintiff filed his DFEH complaint after defendants denied his transfer request, they could not possibly have denied his application in retaliation for his DFEH complaint.

unlawfully discriminated against him. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981).

Defendants do not dispute that plaintiff can establish a prima facie case of retaliation in violation of Title VII. Accordingly, the burden shifts to defendants to articulate a "legitimate, non-discriminatory reason" for rejecting plaintiff's application to the HABA Department. Wrighten, 726 F.3d at 1354. If defendants can articulate such a reason, the presumption of unlawful discrimination "simply drops out of the picture." St. Mary's Honor Center v. Hicks, 509 U.S. 502, 511 (1993).

SNFC explains that it denied plaintiff's application because his schedule preference included only thirty hours per week with either an all-morning or all-evening schedule. According to SNFC, "[g]iven the relatively small size of [the HABA} Department, it is better . . . to have someone who can work an irregular schedule or cover shifts on short notice if another clerk is unable to work than one who is locked into only mornings or evenings." See Johnson Decl. at ¶ 7. Since Keogh indicated that he was willing to work forty hours per week on any days and any times other than Saturday, SNFC had a legitimate, non-discriminatory reason to select him, and not plaintiff, for the HABA clerk position.

Because defendants have articulated a legitimate, non-discriminatory reason for selecting Keogh, the burden shifts to plaintiff to prove by a preponderance of the evidence that the

reason articulated by defendants is a mere pretext, a cover-up for retaliating against him because he protested their alleged failure to comply with the Uniform Guidelines on Employee Selection Procedures. Wrighten, 726 F.2d at 1354. Plaintiff must demonstrate "more than the minimum necessary to create a presumption of discrimination under McDonnel Douglas . . . to raise a triable issue of fact" as to pretext. Wallis v. Simplot Co., 26 F.3d 885, 890 (9th Cir. 1994). Plaintiff must produce "specific, substantial evidence of pretext." Steckl v. Motorola, Inc., 703 F.2d 392, 393 (9th Cir. 1983).

To meet his burden plaintiff adduces evidence that Keogh used the wrong application form, plaintiff had more seniority than Keogh, plaintiff applied once before to work as a HABA clerk but was rejected in favor of a white lesbian and SNFC would not grant his transfer request because the HABA Department's budget could not accommodate his wage level. Plaintiff also alleges that Cynthia Johnson, HABA Department Manager, admitted that plaintiff was more qualified than Keogh for the position as HABA clerk.[3]

Assuming that plaintiff's evidence demonstrates pretext, defendants may nonetheless prevail by demonstrating that they would have chosen Keogh even in the absence of any reason to

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[3] In support of this allegation, plaintiff cites defendants' answers to his interrogatories. Examination of those answers reveals that defendants merely declared that plaintiff was objectively qualified for the position; nowhere do their answers state that plaintiff was more qualified than Keogh. See Defs' Answer to Interrogatory No. 25.

retaliate against plaintiff. Ruggles v. California Polytechnic State University, 797 F.2d 782, 786 (9th Cir. 1985). Defendants adduce such evidence.

To begin, plaintiff's application for the HABA position indicated that he was looking for employment outside SNFC and reflected his feelings of estrangement from SNFC management. See Defs' Exh. E. During the interview, plaintiff's demeanor indicated to Johnson that he harbored negative feelings toward SNFC and that he was not excited about working in the HABA Department, with Johnson or other HABA employees. See Johnson Decl. at ¶ 5. Furthermore, plaintiff received two customer service write-ups in April of 1995, the same month that he applied for the HABA position. See Pltf's Exh. 7.

In contrast, Keogh attached a letter to his application demonstrating his enthusiasm for working in the HABA Department and for continuing to work at SNFC in general. Before submitting his application, Keogh spoke to employees then working in the HABA Department to learn more about the position. "Keogh demonstrated superior customer service skills, a willingness to learn, and an aptitude to embrace the team approach . . . necessary for anybody working within the HABA Department." See Johnson Dec. at ¶ 4. "HABA clerks spend most of their time with the public" -- Keogh's positive attitude made him a good fit for the position. See id.

Considering the small size of the HABA Department (six employees) and the importance of customer service skills and

contrasting the enthusiasm communicated by Keogh to the pessimism communicated by plaintiff, defendants have demonstrated that no reasonable jury would conclude that they would not have chosen Keogh even in the absence of any reason to retaliate against plaintiff. Accordingly, summary judgment is proper for defendants on plaintiff's Title VII retaliation claim.

C. DISPARATE TREATMENT

Plaintiff also alleges that defendants rejected his application for the HABA position on the basis of his race, color or national origin. Title VII prohibits such discrimination in employment. See 42 U.S.C. § 2000e-2(a)(1). A plaintiff may show a violation of Title VII "by proving disparate treatment or disparate impact . . ." Sischo-Nownejad v. Merced Community College dist., 934 F.2d 1104, 1109 (9th Cir. 1997). Plaintiff seeks to prove the former. To do so, plaintiff must show that he was "singled out and treated less favorably than others similarly situated on account of his [race, color or national origin]." Gay v. Waiters' and Dairy Lunchmen's Union, 694 F.2d 531, 537 (9th Cir. 1982).

The same burden-shifting analysis used to analyze Title VII retaliation claims applies to the analysis of Title VII disparate treatment claims. Odima v. Westin Tucson Hotel Co., 991 F.2d 595, 599-601 (9th Cir. 1993). Thus, for the reasons discussed in the preceding section, defendants have demonstrated that they would have selected Keogh for the HABA clerk position

even if they had no prejudice against plaintiff's race, color or national origin. Accordingly, defendants are entitled to summary judgment on plaintiff's Title VII disparate treatment claim.

IV.

ORDERS

For all the foregoing reasons, the court hereby makes the following ORDERS:

1. Defendants' motion for summary judgment on plaintiff's Title VII claims is GRANTED;

2. The remainder of plaintiff's claims are DISMISSED for lack of subject matter jurisdiction; and

3. The Clerk is directed to CLOSE the case.

IT IS SO ORDERED.

DATED: June 11, 1999.

LAWRENCE K. KARLTON
CHIEF JUDGE EMERITUS
UNITED STATES DISTRICT COURT

mdd

United States District Court
for the
Eastern District of California
June 14, 1999

* * CERTIFICATE OF SERVICE * *

2:96-cv-01749

Ponce-Bran

v.

Sacto Natural Foods

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on June 14, 1999, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office, or, pursuant to prior authorization by counsel, via facsimile.

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SJ/LKK

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* MAC PT 9/13/99, JT 11/16/99

Jack L. Wagner, Clerk

BY: _____
Deputy Clerk